

COAL ENERGY, INC.

IBLA 86-174

Decided November 28, 1986

Appeal from a decision of Administrative Law Judge Joseph E. McGuire dismissing with prejudice an application for review of Notices of Violation Nos. 84-091-012-040 and 84-091-061-012 and Cessation Order No. 84-091-012-007.

Affirmed as modified.

1. Appeals--Rules of Practice: Appeals: Timely Filing-- Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Hearings: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

An application for review of a cessation order will be dismissed as untimely filed if the application is filed more than 30 days after receipt of the order. Such application is properly filed with the Hearings Division, Office of Hearings and Appeals. The effective filing date for documents initiating proceedings before the Hearings Division shall be the date of receipt in that office, if filed by hand, or the date such document is postmarked, if filed by mail.

APPEARANCES: James Lowe, President, Coal Energy, Inc., Kingston, Tennessee, for appellant; R. Anthony Welch, Esq., Office of the Field Solicitor, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Coal Energy, Inc., has appealed from a decision of Administrative Law Judge Joseph E. McGuire, dated November 27, 1985, dismissing with prejudice appellant's application for review of Notice of Violation (NOV) No. 84-091-012-040, NOV No. 84-091-061-012, and Cessation Order (CO) No. 84-091-012-007. Judge McGuire dismissed appellant's application for review because appellant had failed to satisfy regulation 43 CFR 4.1162, requiring all applications for review to be filed within 30 days of receipt of the notice or order. We affirm as modified herein.

[1] Appellant received NOV No. 84-091-012-040 on November 15, 1984, and NOV No. 84-091-061-012 was received on July 26, 1984. Appellant did not file an application for review of these notices until February 16, 1985. 1/ Inasmuch as more than 30 days had clearly elapsed between receipt of these notices and appellant's application for review, dismissal of the application as untimely under 43 CFR 4.1162 was proper.

Less clear is whether appellant's application for review of CO No. 84-091-012-007 should be similarly dismissed. The record shows that on November 1, 1984, Ricky Lane, a dozer operator who was apparently in charge of the Coal Energy operation at that time, received CO No. 84-091-012-007 by hand delivery. Service on appellant was also effected by receipt of certified mail on November 15, 1984. Shortly thereafter, on November 28, 1984, appellant requested an informal public hearing pursuant to 30 CFR 722.15. That hearing was held on December 18, 1984, at the minesite near Jamestown, Tennessee. On January 10, 1985, a decision was issued by the hearing officer, Office of Surface Mining Reclamation and Enforcement (OSM), Norris Area Office, holding that CO No. 84-091-012-007 was valid as issued. This decision was received by appellant on January 12, 1985. Coal Energy's application for review of CO No. 84-091-012-007 was combined with its application for review of the two NOV's and is dated February 11, 1985. 2/ For the reasons indicated in note 1, supra, appellant's application for review of the CO is deemed to have been filed on February 16, 1985.

Assuming, arguendo, that appellant's request for an informal public hearing tolled the running of the 30-day period within which it could file an application for review and a new 30-day period commenced on January 12, 1985, the day appellant received OSM's decision based on the informal public hearing, appellant's filing of an application for review on February 16, 1985, was still untimely under 43 CFR 4.1162. Accordingly, we conclude Judge McGuire's decision dismissing the application for review of CO No. 84-091-012-007 was correct.

1/ Judge McGuire found that this application for review was filed on Feb. 20, 1985. Although the application does bear a stamp indicating its receipt by the Hearings Division on Feb. 20, 1985, filing occurs in this context on the date the document is postmarked. 43 CFR 4.1107(f). The envelope containing this application erroneously shows a postage meter stamp reading -- 16 '84. We conclude the application was actually postmarked on Feb. 16, 1985, and such date is the effective filing date. Accordingly, we must modify the decision on appeal.

2/ We note the combined application was sent to counsel for OSM and a copy thereof sent to the Office of Hearings and Appeals (OHA). The proper recipient of an application for review is the Hearings Division, OHA. 43 CFR 4.1161; 43 CFR 4.1107.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge McGuire is affirmed as modified.

John H. Kelly
Administrative Judge

We concur:

R. W. Mullen
Administrative Judge

Will A. Irwin
Administrative Judge

